SUBJECT INDEX

TABLE OF AUTHORITIES CITED

IN THE

Supreme Court of the United States

October Term, 1965
No. 4

MARC D. LEH, individually, and THE PROGRESS COMPANY, a copartnership comprised of MARC D. LEH and DAVID BROWN, co-partners,

Petitioners,

vs.

GENERAL PETROLEUM CORPORATION, a corporation, STANDARD OIL COMPANY OF CALIFORNIA, a corporation, TEXACO INC., a corporation, RICHFIELD OIL CORPORATION, a corporation, UNION OIL COMPANY OF CALIFORNIA, a corporation, TIDEWATER OIL COMPANY, a corporation,

Respondents.

BRIEF FOR PETITIONERS.

Opinions Below.

The opinion of the District Court, constituting its findings of fact and conclusions of law [R. 1209-1227],[1] is reported at 208 F. Supp. 289 (1962). The opinion of the Ninth Circuit Court of Appeals [R. 4-26] is reported at 330 F. 2d 288 (1964).

[1]Since the record is not printed, references are to the original record.

Jurisdiction.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 2, 1964 [R. 3]. On October 19, 1964 this Court granted a petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, limited to Question 6 presented by the petition. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented.

Whether the applicable statute of limitations was tolled by Section 5 of the Clayton Act during the pendency of the Government's action in *United States v. Standard Oil Company of California, et al.* (Civil No. 11584-C)?

Statutes Involved.

The relevant paragraph of Section 5 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. §16(b) (1964 ed.), reads as follows:

> "(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the anti trust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter; *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended

hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

Statement.

Petitioners by complaint filed September 28, 1956, alleged that a conspiracy was initiated among respondents in 1948 unlawfully to restrain and monopolize interstate commerce in the distribution and sale of refined gasoline, and that respondents then and thereafter combined to exclude petitioners from the wholesale distribution and sale of gasoline, both by controlling sales to petitioners and by limiting petitioners' sources of supply [R. 2-27, Vol. II-V]. It is conceded that petitioners' cause of action accrued no later than February, 1954, and that the applicable statute of limitations commenced to run at that time, unless suspended under Section 5(b) of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. §16(b) (1964 ed.), by a similar proceeding "instituted by the United States".

Petitioners contend that the similar proceeding which during its pendency suspended the applicable statute of limitations was *United States v. Standard Oil Company of California et al.* (Civil No. 11584-C) [R. 1136-1158, Vol. II-V].

It is conceded that the four-year limitations period with respect to private causes of action under the antitrust laws, Section 4B of the Clayton Act, 69 Stat. 283, 15 U.S.C. §15b (1964 ed.), is inapplicable to a cause accruing in 1954.

Respondents by answer denied petitioners' allegations and asserted by way of affirmative defense that peti-

tioners' action was barred by the applicable statute of limitations [R. 98-157, Vol. II-V]. Subsequently respondents moved for a summary judgment of dismissal upon the defense of time bar [R. 612-616; 1182-1183; Vol. II-V], which motion was granted [R. 1209-1227, Vol. II-V], and from which an appeal was prosecuted to the United States Court of Appeals for the Ninth Circuit.

The district court held that the applicable Statute of Limitations was California Code of Civil Procedure §340(1) providing a one-year period to govern actions to recover "upon a statute for a penalty or forfeiture, . . ." (208 F. Supp. at 294). The Ninth Circuit affirmed, stating that the holding of the district court cannot "be held clearly erroneous" (330 F. 2d at 301).

Both courts held that the statute of limitations was not tolled by Section 5(b) of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. §16(b) (1964 ed.), during the pendency of the government's action in *United States v. Standard Oil Company of California, et al.* (Civil No. 11584-C).

Summary of Argument.

In holding that the statute of limitations was not tolled by Section 5(b) of the Clayton Act during the pendency of the government's action in *United States v. Standard Oil Company of California, et al.* (Civil No. 11584-C), both the district court and the Ninth Circuit Court of Appeals relied upon and applied the strict construction of Section 5(b) laid down by *Steiner v. 20th Century-Fox Film Corp.*, 232 F. 2d 190 (9th Cir. 1956). The *Steiner* case was wrongly decided and is in conflict with decisions of the Seventh and Tenth Cir-

cuits. Its requirement of collateral estoppel has been repudiated by this Court in *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 85 S. Ct. 1473 (1965).

The "plain meaning" of Section 5(b) of the Clayton Act is that the statute of limitations is tolled during the pendency of a government action if the private antitrust right of action is based "in part" on the government action. This interpretation of Section 5(b) gives effect to the clearly expressed congressional desire that private parties be permitted the benefits of prior government actions.

A comparison of the allegations of the amended complaint in the government case with the allegations of the amended complaint in petitioners' action, and petitioners' memorandum of contentions of fact and law, shows conclusively that petitioners' action is based "in part" on the government action. The arguments made by respondents in the Ninth Circuit Court of Appeals are based in large part upon the repudiated notions of collateral estoppel and are without merit. Since petitioners' action is based at least "in part" on the government action, the statute of limitations was tolled by Section 5(b) of the Clayton Act during the pendency of the government action.

ARGUMENT.

I.

The Steiner Case Was Wrongly Decided.

Steiner v. 20th Century Fox Film Corp., 232 F. 2d 190 (9th Cir. 1956), involved a suit brought by the lessor of a movie theatre against individual lessees and various theatre corporations for monopolizing the exhibition of motion pictures by, among other things, the leasing of theatres for less than a fair rental. Plaintiff lessor claimed that she had been coerced into accepting a low rental by threats that otherwise her theatre would not get first-run pictures and that a competing theatre would be built to show first-run pictures.

The "pivotal issue" was whether plaintiff's claim was barred by the statute of limitations, or whether the running of that statute had been tolled under 15 U. S. C. §16 during the pendency of *United States v. Paramount Pictures*, Equity No. 87-273 (D.C.S.D.N.Y.).

The court held that plaintiff had not alleged a case sufficiently similar to the *Paramount* case to toll the statute of limitations. The court said: "A greater similarity is needed than that the same conspiracies are alleged. The same means must be used to achieve the same objectives of the same conspiracies by the same defendants." 232 F.2d at 196.

To the extent that *Steiner* appears to require a private plaintiff who would toll the statute of limiations to plead the same overt acts as the Government has pleaded, it cannot be correct. The Government doesn't have to plead any overt acts whatever. The cases are collected in footnote 59 to *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224, 60 S. Ct. 811, 845 (1940)

In evolving its stringent *Steiner* test, the court relied in part on *Christensen v. Paramount Pictures, Inc.*, 95 F. Supp. 446 (D. Utah 1950). This reliance was misplaced. In *Christensen,* the District Judge held that the Utah statute of limitations was tolled by 15 U. S. C. §16, as to defendants named in the *Paramount* complaint. The portion of the *Christensen* case apparently referred to in *Steiner* appears at 95 F. Supp. at 455. It reads: "When Congress used the words 'any matter complained of' it referred to acts of the *named* defendants of which the Government might complain in any suit or proceeding." (Emphasis supplied.) The distinction under consideration was the difference between "named" and "unnamed" defendants. It had nothing to do with a distinction between the defendants' conspiracy and the overt "acts" which they may have committed in furtherance of that conspiracy.

Momand v. Universal Film Exchange, 43 F. Supp. 996 (D. Mass. 1942), particularly pages 1011-1013, was also relied upon by the court in *Steiner.* A close reading of those pages will reveal that with respect to a number of the plaintiff's causes of action, the statute of limitations was deemed to have been tolled. To be sure, the court in *Momand* did exclude other causes of action from the tolling provisions of 15 U. S. C. §16. The decision cannot, however, be taken as an authoritative statement of the law in view of the trial court's statement:

> "Since judgments there could not serve as prima facie evidence here, those proceedings cannot toll the statute of limitations for the benefit of this plaintiff. This is clear from the juxtaposition of the two paragraphs which together constitute Section 5 of the Clayton Act." 43 F. Supp. at 1012.

This statement is incorrect. It was laid to rest in the last term of this Court:

> "Moreover, under §5(a) the judgment or decree may be used only as to matters respecting which it would operate as an estoppel between the parties. No such limitation appears in the tolling provision. It applies to every private right of action based in whole or in part on 'any matter' complained of in the government suit."
>
> *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 316-17, 85 S. Ct. 1473 (1965).

In addition to the above two District Court cases, which do not upon analysis offer any foundation for *Steiner*, the court relied upon the legislative history of the statute. The Ninth Circuit said:

> "In writing this provision ('any matter complained of') Congress made reference to the matters complained of in the public conspiracy action, not the conspiracy itself." See 232 F. 2d at 196.

If the statement refers to the preceding quotation from H. R. Rep. No. 627, 63rd Cong., 2d Sess. p. 14, then it is without support in the whole passage from which the quotation is taken. If it refers to some other expression of Congressional intent, then it is not supported by a citation.

The quotation from the House Report is part of a discussion which reads, in whole, as follows:

> "Section 6 provides that a final decree obtained by the United States in a suit to dissolve a corporation or unlawful combination may be offered in evidence in a suit brought by a private suitor

for damages under the antitrust laws by reason of the unlawful acts of the defendant corporation, and that when such decree or judgment is so offered it shall be conclusive evidence of the same facts and be conclusive as to the same questions of law as between the parties in the original suit or proceeding. This section also provides that the statutes of limitations shall be suspended in favor of private litigants who have sustained damage to their property or business by the wrongful acts of the defendant during the pendency of the suit instituted by or on behalf of the United States. The entire provision is intended to help persons of small means who are injured in their property or business by combinations or corporations violating the antitrust laws.

"It is in keeping with a recommendation made by the President in his message to Congress on the general subject of trusts and monopolies."

The "wrongful acts of the defendant" mentioned in this passage are the acts which cause the plaintiff's injury. Such acts must of course be pleaded and proven by a private plaintiff before he can recover damages. But the passage does not suggest that any particular acts (other than a "conspiracy itself," in the languge of *Steiner*) must be pleaded or proven in the Government case. On this latter point, the passage is simply silent. And the case law is settled: The Government makes its case by pleading and proving the conspiracy alone, without showing any overt acts whatever. *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 224, 60 S. Ct. 811, 845 (1940), footnote 59, and cases cited.

Finally, the Ninth Circuit itself in *20th Century Fox Film Corp. v. Goldwyn,* 328 F. 2d 190, 219-220, fn. 58 (9th Cir. 1964), has recently intimated that it may agree that the *Steiner* case was wrongly decided:

> "58. It is therefore unnecessary for us to decide whether this is likewise true with regard to conspiracies to exclude independently produced films from affiliated theatres, as charged in other sections of the *Paramount* complaint. Nor, in view of the disposition which we have made of this matter, do we find it necessary to pass upon plaintiff's contention that the *Steiner* case was wrongly decided. The cogent arguments made in support of that contention we leave for determination in some future litigation in which such a decision may be required."

II.

The Steiner Case Is in Conflict With Decisions of the Seventh and Tenth Circuits.

The month after the Ninth Circuit decided *Steiner v. 20th Century Fox Film Corp., supra,* the Seventh Circuit decided the case of *Grengs v. 20th Century Fox Film Corp.,* 232 F. 2d 325 (7th Cir. 1956), cert. denied 352 U. S. 871, 77 S. Ct. 96 The *Grengs* case was a treble damage action brought by a former motion picture exhibitor who alleged that he had been run out of business by a conspiracy which embraced both some *Paramount* case defendants and some local exhibitors who had not been parties to the *Paramount* case. The trial court dismissed as to all defendants. On review, the Seventh Circuit analyzed a number of the statute of limitations problems and concluded that plaintiff's

causes of action were barred as to certain defendants but not as to others. In comparing the plaintiff's complaint with the Government complaint in the *Paramount* case, the court said:

> "(Plaintiff's) amended complaint sets forth a right of action arising under the antitrust laws of the United States and, in so doing, *duplicates violations* of said laws charged against the same distributor defendants in the Paramount case. Thus plaintiff sets forth a private right of action which is, at least in part, grounded on the same matters of which the Government complained in the Paramount case." 232 F. 2d at 330 (Emphasis added).

Just what were those "violations" which Grengs' complaint "duplicated"? The only such "violations" which were pending in the *Paramount* case for long enough to help Grengs were the defendant's "vertical integrations." (See 232 F. 2d at 333 where the court said:

> "Thus it was . . . determined that the vertical integrations were active aids to the conspiracy . . . (and were) therefore violations of the act. The amended complaint herein charges such vertical integrations . . . Hence this action was not barred by the statute of limitations . . .").

Thus it can be seen that the *Grengs* case is clearly inconsistent with the *Steiner* case. *Steiner* insists that "the same means must be used to achieve the same objectives of the same conspiracies by the same defendants" (232 F. 2d at 196). The *Grengs* case represents the better rule.

The Tenth Circuit has also recently addressed itself to the problem. In the case of *Union Carbide and*

Carbon Corp. v. Nisley, 300 F. 2d 561 (10th Cir. 1962), that court considered the *Steiner* case, but refused to follow it. The *Nisley* court rejected the idea that a private plaintiff should "be put to the necessity of bringing suit on the same conspiracy alleged in the government suit, or suffer the bar of the statute as to every overt act not complained of in the government suit. This interpretation would lead to a multiplicity of suits with duplication of proof. It would add to the burdens of the private suitor to the harassment of the defendants. We do not think Congress intended any such result." 300 F. 2d at 570.

The Tenth Circuit held in the *Nisley* case that "there was substantial identity of subject matter, and this was sufficient to suspend the running of the statute." 300 F. 2d at 570. This is a broad test, and wholly incompatible with the test propounded by *Steiner.*

III.

The Plain Meaning of the Statute.

Section 5(b) of the Clayton Act provides that, when the government proceeds,

> "the running of the statute * * * in respect of every private (anti-trust) right of action * * * based in whole or in part on any matter complained of in (the government) * * * proceeding shall be suspended during the pendency thereof. . . ."
>
> 38 Stat. 731, as amended, 15 U.S.C. §16(b) (1964 ed.).

The plain meaning of this statute is clear enough. If petitioners' private right of action was even partly based upon any matter complained of in *United States*

v. Standard Oil Company of California, et al., Civil No. 11584-C, then the statute of limitations was tolled during the pendency of the Government case.

A "plain meaning" interpretation of the antitrust statutes was endorsed by this Court in *Radovich v. National Football League,* 352 U.S. 445, 454, 77 S. Ct. 390, 395 (1957), as follows:

> ". . . Congress itself has placed the private antitrust litigant in a most favorable position through the enactment of §5 of the Clayton Act. *Emich Motors Corp. v. General Motors Corp.,* 1951, 340 U.S. 558, 71 S.Ct. 408, 95 L.Ed. 534. In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws."

A "plain meaning" interpretation of the tolling provisions of the statute serves an important public policy. As the Court said in *Christensen v. Paramount Pictures, Inc.,* 95 F. Supp. 446, 454 (D. Utah, 1950):

> "Tolling the statute of limitations protects the plaintiff while his right of action ripens, and rewards him for withholding his suit at a time when it is the policy of the law to free the defendant from its annoyance."

If the tolling provisions of 15 U.S.C. §16 are narrowly construed, the well-advised plaintiff will sue promptly as soon as the filing of the Government suit makes it appear that he may have a cause of action. He will not risk the possibility that the statute of limitations is running against his claim during the pendency of the Government suit. As a consequence, the defendant in the Government suit will likely find that he is a

defendant in many private suits brought by plaintiffs anxious to protect their rights of action. This cannot be the result which Congress intended.

The district court in the instant case recognized that *Steiner v. 20th Century-Fox Film Corp., supra,* "strictly construed" §5 of the Clayton Act (208 F. Supp. at 294). Only last term this Court stated that, where two interpretations are possible, and Congress has evidenced neither acceptance nor rejection of either interpretation, yet one effects a clearly expressed co[illegible]essional purpose while the other defeats it, the interpretation effecting the congressional purpose is to be adopted.

> *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.,* 381 U.S. 311, 321, 85 S. Ct. 1473, 1478 (1965).

The "pivotal question" for determination, in such an event, was expressed by the Court in *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co., supra,* at 321, as: "(W)hether congressional purpose is effectuated by tolling the statute of limitations in given circumstances." And the court said at page 320 of the same decision:

> "In resolving this question we must necessarily rely on the one element of congressional intention which is plain on the record—the clearly expressed desire that private parties be permitted the benefits of prior government actions."

The only test applied by the Court in *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co., supra,* was whether New Jersey Wood's claims were bas d "in part" on the Commission action involved therein. That is the plain meaning of the statute. Petitioners submit that the "plain meaning" test should be applied in the instant case.

IV.

The Statute of Limitations Was Tolled by §5(b) of the Clayton Act During the Pendency of the Government's Action in United States v. Standard Oil Company of California, Et Al. (Civil No. 11584-C).

The amended complaint in the government case [R. 1136-1158, Vol. II-V] charges the defendants there named with, among other things:

1. Stabilizing the amount of crude oil to be produced through the Conservation Committee of California Oil Producers and through establishment of production quotas [Pars. 70a(1)(a) and (c); R. 1151, Vol. II-V].

2. Sharing wholesale and retail markets in the sale of gasoline by standardizing the various grades, qualities and structure of gasoline and by selling gasoline and other refined products at identical prices [Pars. 70a (5)(a) and (c); R. 1152, Vol. II-V].

3. Fixing and maintaining uniform and non-competitive prices for the sale of gasoline by causing the posting of an agreed price for each type and grade of gasoline at wholesale distribution points, and by causing each other to post and charge identical prices at such points [Pars. 70a(6)(a) and (b); R. 1152, Vol. II-V].

4. Fixing and maintaining uniform and non-competitive resale prices to be charged consumers by retailers handling gasoline [Pars. 70a(7); R. 1152, Vol. II-V].

5. Maintaining agreed upon wholesale and retail prices by refusing to sell gasoline to any wholesale or retail distributors who refused to follow the prices fixed

and by adopting the uniform policy of refusing to sell gasoline to any wholesale distributor, jobber, or retail dealer who would not agree to sell the products of a single defendant major on an exclusive dealing basis [Pars. 70a (8) (a) and (b); R. 1152, Vol. II-V].

6. Limiting the amount of crude oil which independent producers might produce through the Conservation Committee of California Oil Producers [Pars. 70b (1); R. 1152, Vol. II-V].

7. Purchasing the capital stock or assets, or both, of independent refiners, inducing independent refiners to shut down their productive capacity in return for an agreement to furnish such independent refiners with their requirements of gasoline, acquiring the operating and management control of competing independent refineries under various contractual arrangements, refusing to sell crude oil to independent refiners, limiting the supply of crude oil available to independent refiners through prorates imposed by the Conservation Committee of California Oil Producers, imposing a squeeze upon independent refiners by temporarily raising the price of crude oil while maintaining the existing price of gasoline, thus eliminating the profit margains of independent refiners, and foreclosing independent wholesale and retail markets otherwise available to independent refiners by requiring independent jobbers, wholesalers, and retailers to handle exclusively the refined petroleum products of the defendant majors [Pars. 70b (6), (7), (8), (10), (11), (12) and (15); R. 1153-1154, Vol. II-V].

Petitioners' amended complaint [R. 12-27, Vol. II-V] charges that the defendants there named engaged in an unlawful combination and conspiracy unreasonably to

restrain trade and commerce in the interstate distribution and sale of refined gasoline, and agreed:

1. To exclude independent jobbers of refined gasoline from the distribution thereof by eliminating their source of supply and by forcing them out of the market;

2. To eliminate the customers of independent jobbers (*i.e.*, retailers) by refusing to sell gasoline to independent jobbers for sale to retailers and by fixing and controlling the price at which gasoline would be sold, if at all, to independent dealers and jobbers selling gasoline in the Southern California area.

3. To exclude the customers of independent jobbers (*i.e.*, retailers) from competing with retail outlets owned and operated by the defendants by shutting down and controlling the supply of gasoline to independent jobbers and by fixing and controlling the price at which gasoline would be sold, if at all, to independent dealers and jobbers selling gasoline in the Southern California area.

4. To obtain monopolistic control over the supply, distribution and sale of gasoline sold through retail outlets in the Southern California area by refusing to sell refined gasoline to independent jobbers, or their customers, and by fixing and controlling the price at which gasoline would be sold, if at all, to independent dealers and jobbers selling gasoline in the Southern California area.

5. To obtain prohibitive and non-competitive profits from the wholesale and retail sale of refined gasoline by eliminating the sale and distribution of gasoline through independent jobbers, by controlling the outlets

through which retail sales of gasoline are made, and by fixing and controlling the price at which gasoline would be sold, if at all, to independent dealers and jobbers selling gasoline in the Southern California area.

6. To deprive the general public of the advantages of a competitive market for the retail purchase of refined gasoline by fixing and controlling the supply and price of gasoline flowing to and available for distribution by independent jobbers.

7. To prevent and retard the development of wholesale distribution of gasoline throughout the Southern California area by controlling the supply of gasoline in the Southern California area, controlling the retail outlets through which gasoline is marketed, and fixing and controlling the price at which gasoline would be sold, if at all, to independent dealers and jobbers selling gasoline in the Southern California area.

Petitioners' amended complaint [R. 12-27, vol. II-V] further alleged that the defendants there named accomplished the objects and purposes of their unlawful activities by the following acts:

1. Controlling the sale and distribution of refined gasoline in the Southern California area;

2. Denying independent jobbers access to a source of supply of refined gasoline;

3. Preventing independent jobbers from obtaining refined gasoline from other sources;

4. Preventing the customers of independent jobbers (*i.e.*, retailers) from obtaining gasoline with which to compete with retail service stations and outlets operated or controlled by the defendants there named;

5. Maintaining fixed, artificial and uncompetitive prices for the wholesale and retail sale of refined gasoline in the Southern California area;

6. Destroying any substantial competition afforded defendants in the wholesale and retail selling and marketing of refined gasoline in the Southern California area;

7. Controlling the sources of refined gasoline in the Southern California area and preventing and precluding independent jobbers from obtaining source and supply.

In addition, petitioners' memorandum of contentions of fact and law, on file since September 10, 1959, states that petitioners rely upon:

1. Refusal by the major defendants and their resellers to sell to service stations which are operated strictly on a "self-serve" basis or to the suppliers of such service stations [R. 282, Vol. II-V].

2. Computation by the major defendants of the price paid per gallon by independent jobbers for gasoline by deducting an allowance from the appropriate posted tank wagon or tank truck price of the major defendants [R. 283, Vol. II-V].

3. Predatory price cutting by the major defendants [R. 284, Vol. II-V].

4. Granting by the major defendants of special allowances in price war areas to their conforming dealers [R. 284, Vol. II-V].

5. Attempts by the major defendants to maintain a two-cent price margin between their retail

prices and the prices of self-serve stations [R. 285, Vol. II-V].

6. Attempts by the major defendants to direct and control the customers and business of their re-brand distributors and sub-distributors at the wholesale and retail level [R. 285, Vol. II-V].

7. Policing of the market by the major defendants by field surveys and reporting from dealers and distributors [R. 286, Vol. II-V].

8. Refusal by the major defendants to sell to "split pump" stations [R. 286, Vol. II-V].

9. Uniform prices and price moves by the major defendants [R. 287, Vol. II-V].

10. Use by the major defendants of a wholly artificial and fictitious tank wagon or tank truck price [R. 287, Vol. II-V].

11. Use by the defendant Standard Oil Company of California, and at least some of the other major defendants, of consignment agreements rather than purchase and sale contracts to achieve vertical price fixing [R. 288, Vol. II-V].

12. Acquisition by the major defendants by systematic and parallel action of the crude oil supply of the independent refiners in the Southern California area, thereby converting the independent refiner into a jobber with a fixed supply of gasoline [R. 288, Vol. II-V].

13. Attempts by the major defendants to direct and control the price of their distributors and sub-distributors of gasoline at wholesale and retail [R. 289, Vol. II-V].

14. Use by the major defendants of "clearance letters" to be obtained from each other before taking on new business [R. 289, Vol. II-V].

15. Participation by the major defendants in the program of the Conservation Committee of California Oil Producers [R. 289-290, Vol. II-V].

16. Determination by each of the major defendants of the price which it will pay for crude oil at a particular field in accordance with prices posted by others of the defendants or the Shell Oil Company [R. 290, Vol. II-V].

17. Uniform acquisition by the major defendants of retail outlets [R. 290, Vol. II-V].

18. Uniform refusal by the major defendants to permit their brand names to be displayed by independent dealers obtaining their gasoline through independent jobbers. [R. 290, Vol. II-V].

The above comparison would seem to show overwhelmingly that petitioners' right of action is based at least in part upon matters complained of in the government proceeding. Defendants in the Ninth Circuit Court of Appeals, however, basing their argument on *Steiner v. 20th Century-Fox Film Corp., supra,* urged four distinctions between petitioners' right of action and the government proceeding, none of which, petitioners submit, is controlling here.

Firstly, defendants pointed out that petitioners' case was premised on a conspiracy alleged to have been formed in 1948, while the government's complaint charged a conspiracy formed in 1936 [R. 1151, Vol. II-V]. In *Philco Corp. v. Radio Corp. of America,* 186 F. Supp. 155 (E. D. Pa. 1960), however, the

Court found no difficulty in construing plaintiff's complaint to include allegations of a smaller conspiracy within a larger conspiracy. Beyond this, the government complaint alleges a conspiracy beginning in or about the year 1936 and continuing thereafter up to and including the date of filing of the complaint in May, 1950 [R. 1151, Vol. II-V]. Thus, the government alleges that the conspiracy charged by it was in progress in 1948, the year petitioners allege the conspiracy charged in their complaint to have been formed.

Adopting a "plain meaning" test, can there be any doubt, from the comparisons above set forth, that petitioners and the government are talking about the same thing? The government charges a vast combination and conspiracy involving the Pacific States Area, defined as the states of California, Oregon, Washington, Nevada and Arizona [R. 1137, Vol. II-V]. Petitioners' complaint is primarily concerned with the reaction of the defendants to "self-serve" gasoline stations, a post-war phenomenon.

However, given a conspiracy alleged to have been formed in 1936 between the defendants named in the government complaint, involving the five western states, and continuing from 1936 to and including May, 1950, to then say that this conspiracy did not progress beyond the economic realities and conditions of 1936, and did not react to "self-service" gasoline stations and the activities of petitioners herein, and others similarly situated, is to utter an absurdity. Common-sense tell us that petitioners are simply complaining about the effects on them, in 1948, of the agreements, decisions and actions made and taken in 1948 to meet the "self-service" threat, by the huge conspiracy alleged by the government to have been originally formed in 1936.

Second, in the Ninth Circuit Court of Appeals, respondents relied upon the fact that the alleged conspirators in this case and in the government case are not identical. In the government case, the Shell Oil Company and the Conservation Committee of California Oil Producers were defendants and alleged conspirators [R. 1139-1140, Vol. II-V], but they are not named in the instant case. Additionally, the Olympic Refining Company was not named in the government's case, but was made a defendant here [R. 12-27, Vol. II-V], although now dismissed from this case [R. 607, Vol. II-V].

However, this argument is based upon the statement in *Steiner v. 20th Century-Fox Film Corp., supra,* at 196, that the "general rules of collateral estoppel apply." The premise of the argument was repudiated by this Court in *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co., supra,* at 316, where this Court stated:

> "Moreover, under §5(a) the judgment or decree may be used only as to matters respecting which it would operate as an estoppel between the parties. No such limitation appears in the tolling provision. It applies to every private right of action based in whole or in part on 'any matter' complained of in the government suit."

Thirdly, respondents in the Ninth Circuit Court of Appeals argued that the conspiracy alleged here was different from that complained of in the government case. The allegations of petitioners' amended complaint and petitioners' memorandum of contentions of fact and law have been set forth above, as have certain of

the allegations of the government's amended complaint. They will not be here repeated. However, in the words of this Court in *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co., supra,* at 322, "(c)ertainly the allegations (of petitioners' action) are based 'in part' on the . . . (government) action."

Finally, respondents argued in the Ninth Circuit Court of Appeals that the Government's case was concerned exclusively with events alleged to have occurred prior to May of 1950, while petitioners alleged that the final cut-off of their supply of gasoline occurred in 1954. Under this argument there could be no tolling of the statute of limitations as to events occurring subsequent to the filing of the government action. In addition to being manifestly absurd, the argument falls for two other reasons. First, it is based on the premise of collateral estoppel which, as has already been pointed out, was repudiated by this court as to §5(b) of the Clayton Act in *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co., supra.* Second while the language is admittedly somewhat ambiguous, the quotation from H.R. Rep. No. 627, 63rd Cong., 2d Sess. p. 14, relied upon by the Court in *Steiner v. 20th Century-Fox Film Corp., supra,* at 196, would seem to belie such an interpretation:

> "This section (Section 6) also provides that the statutes of limitations shall be suspended in favor of private litigants who have sustained damage to their property or business by the wrongful acts of the defendant *during* the pendency of the suit instituted by or on behalf of the United States" (Emphasis added).

Finally, as a matter of policy in construing the anti-trust laws, petitioners submit that an interpretation of §5(b) of the Clayton Act which would limit tolling of the statute of limitations only to acts occurring up to, but not after, the filing of the government complaint, would flout "the clearly expressed desire that private parties be permitted the benefits of prior government actions."

> *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 320, 85 S. Ct. 1473, 1478 (1965).

Petitioners therefore submit that their action is based at least "in part" on the government action. Nothing more is required under the "plain meaning" of Section 5(b) of the Clayton Act.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the decisions of the district court and the Ninth Circuit Court of Appeals should be reversed.

August, 1965.

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